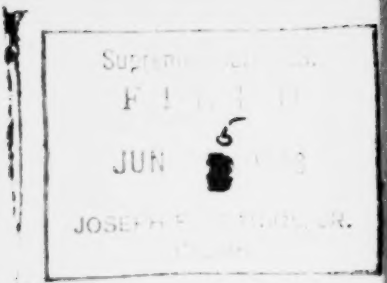

NO. 85-1674

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985.

WILLIAM NADWORNY,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE
COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR RESPONDENT IN OPPOSITION

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COMMONWEALTH OF MASSACHUSETTS
Respondent.

Respondent is not dissatisfied with petitioner's Citation to Opinion Below and statement of Jurisdiction and Statement of Case.

STATEMENT OF FACTS

The facts of the case are amply set out in the opinion of the court, Commonwealth v. Nadworny, App. A 3a-12a, and need not be restated here.

REASONS FOR NOT GRANTING THE WRIT

I. The Petition Totally Fails To Meet Any Of The Considerations Governing Review As Provided In Rule 17, Rules Of The Supreme Court

A. The petition totally fails to allege that the court below has rendered a decision on a federal question in a way in conflict with the decision of another state court or of a federal court of appeals as provided in Rule 17(1)(b).

B. The petition totally fails to allege that the state court has decided an important question of federal law which has not been, but should be,

settled by this Court or has decided a federal question in conflict with applicable decisions of this Court as provided in Rule 17(1)(c).

II. There Is No Merit To The Petition

A. There Was No Constitutional Violation In The Refusal Of The Trial Judge To Instruct On Manslaughter

Petitioner misinterprets the import of Beck v. Alabama, 447 U.S. 625 (1980) and Hopper v. Evans, 456 U.S. 605 (1982). The cases do not stand for the principle that there is a constitutional right to a lesser included offense instruction in the instant case. Beck and Hopper concern only a statutory preclusion to a judge giving a jury the

option of convicting a defendant of a lesser included offense in a capital case. In the instant case no statute prevented the giving of an instruction. The judge properly refused to so charge, under Massachusetts law because "no view of the evidence, resolving all reasonable evidence in favor of the defendant, permitted a finding of manslaughter. See Commonwealth v. Vanderpool, 367 Mass. 743, 746 (1975)

B. The Remaining Issues Do Not Merit Review

The remaining issues involve only questions of evidence and factual findings (See, Sections II, III, V).

The allegation contained in Section V, is frivolous. The Fifth Amendment, which by its terms, provides that no person "shall be compelled in any criminal case to be a witness against himself" has no application to a telephone conversation between a policeman and a suspect, who has not been charged and is totally free to terminate the conversation. Oregon v. Mathiason, 429 U.S. 492, 494-495 (1977) (Per Curiam) The court below applied the proper Due Process analysis.

CONCLUSION

For the above stated reasons the petition should be denied.

Respectfully submitted,

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